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Lauren W. Gibbs, Inc. v. E. E. Monson, Joseph Chez, and Rulon F. Starley, and the Securities Commission of the State of Utah : Reply Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LAUREN W. GIBBS, INC., a corporation,

Plaintiff and Respondent,

vs.

E. E. MONSON, Secretary of State of the State of Utah, JOSEPH CHEZ, Attorney General of the State of Utah, and RULON F. STARLEY, State Bank Commission of the State of Utah, as members of the Securities Commission of the State of Utah, and the SECURITIES COMMISSION OF THE STATE OF UTAH,

Defendants and Appellants.

No. 6331

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I.
THE ISSUES LIMITED BY BRIEF AND RECENT CASE

In view of the decision handed down by this Court in the case of Withers v. Golding, since the filing of this appeal, some of the points raised by this appeal need no further discussion. It may now be asserted as law that the issues to be decided by the district court in an action

brought against a commission operating under a statute like Section 79-1-36, Revised Statutes of Utah, 1933, are "certainly not the issues raised before the commission, but the issues raised by the pleadings before the court."

Sections 79-1-36 and 82-1-42 are identical and the history back of each is practically the same, and since the Securities Commission operates under Section 82-1-42 the construction placed on 79-1-36 in the Withers case is applicable to the case at bar. The issues, therefore, are limited, by appellants' principal brief and respondent's answer brief, to these:

1. Did the District Court have authority to suspend the final order of the Securities Commission ex parte, without notice, and without affording a hearing to the Commission?

2. Did the District Court have authority to order a license to remain in force indefinitely pending determination of the cause and contrary to the provisions of the statutes?

3. Did the District Court have authority to order a complete transcript of the proceeding before the Commission to be filed with the Court in advance of the trial, when the proceeding before the Court was neither an appeal nor a plenary review of the record, but an independent action on issues raised by the complaint before the Court?

4. Did respondent, in its complaint, state grievances sufficient to raise any issues triable by the Court?

All these questions, we believe, are rather thoroughly answered in our main brief, but we may assist the Court

by pointing out some recent decisions and articles showing a decided trend toward fixing a general basis for determining the proper relationship between courts and commissions, which may not have come to the Court's attention.

II.
ADMINISTRATIVE LAW TRENDS

Admittedly there has been great confusion in this field, and that because of the rapid multiplication of boards and commissions which entrench upon the time honored functions of courts. It may be conceded at once that no true American wants to see our judicial system destroyed or ham-strung; neither does any true American want the wheels of progress impeded by resistance to necessary change in methods of control in our economic and social lives, under the Constitution.

Elihu Root, while President of the American Bar Association, became fully aware of directional trends in fields of social and economic control, and because of his awareness felt called upon to advise the bench and bar as follows:

> "There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from old methods of regulation by specific statutes enforced by the courts . . . There will be no withdrawal from these experiments . . . We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing

which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."—Quoted from next case cited.

In the case of Federal C. C. v. Pottsville Broadcasting Company, 309 U.S. 134, 84 L. ed. 656, the Supreme Court of the United States picked up this advice and enlarged upon it as follows:

> "Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process.
>
> " . . . To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and

administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

" . . . In 'sharp contrast with the previous grant of authority' the court was restricted to a purely judicial review. 'Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision.' "

" . . . . It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' "

Legislatures in every State in the Union, as well as the Federal Congress, are exercising to an amazing degree their right to guard over the liberties and welfare of the people, resulting in a multitude of statutes which must be followed by the courts, as well as the people, so long as they do not violate constitutional prohibitions.

In construing such statutes courts have reached all kinds of conclusions both as to the constitutionality and the scope thereof. It is comparatively easy, therefore, to collate authorities to support almost any point of view. As the statutes change in the various States, opinions of the courts change to accord with the statutes, and thus the opinions of a single State court seem to be at variance with themselves.

To illustrate: California courts as early as 1897 adopted this now modern doctrine from an earlier Connecticut case:

> "The doctrine perhaps cannot be better stated than in the language of Seymour, J., in Dailey v. City of New Haven, 60 Conn. 450, 20 Atl. 666, this Court held that whenever bodies like boards of common council are acting within the limits of powers conferred on them, and in due form of law, the rights of courts to supervise, review, or restrain is exceedingly limited. With the exercise of discretionary powers, courts rarely, and only for grave reasons, interfere. Those grave reasons are found only where fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law, enter into or characterize the result. Difference of opinion or judgment is never a sufficient ground for interference." Union Transp. Co. v. Bassett, 118 Cal. 604; 50 Pac. 754.

In later cases a much more restricted course is allowed California boards and commissions. In the very recent case of Drummey v. State Board, 87 Pac. (2nd) 848, the Court, while holding that "due process does not

require any particular form of notice or procedure" (p. 851), it also said that

> "The solution of the problem as to the proper remedy of those aggrieved by the action of general state-wide administrative boards in suspending or depriving holders of existing licenses to secure 'review' in its broadest sense, of the board's action, is one that finds no positive answer in the cases heretofore decided". (P. 852)

It having been decided in prior California cases that 'review' is properly instituted by mandamus, it then held that in such review the court "must exercise its independent judgment on the facts", saying further:

> "We think the limitations on the rule that the court must exercise its independent judgment on the facts in such cases, suggested by the United States Supreme Court in the St. Joseph Stock Yards case are sound". (P. 854).

This shows not only a departure from the broad doctrine of the earlier California cases but also a complete misunderstanding of the doctrine of the St. Joseph Stock Yards case, 298 U.S. 38, 56 S. Ct. 720, 80 L. ed. 1033.

In that case the Court made a clear distinction between commissions handling rate cases involving confiscation of property, and commissions concerned only with licensing matters. In the former it was held the Court may exercise its independent judgment on the facts, but in the latter the Court may not weigh the evidence at all. There was a dissent to this holding, but it was not in favor of having the Court weigh the evidence in all cases but rather it was in favor of denying the courts the right to weigh the evidence in any case. In all but rate cases,

both the majority and minority judges agreed that the functions of the courts with respect to reviewing procedures of boards and commissions is as follows:

> "The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 446, 47 L. ed. 892, 896, 23 S. Ct. 571; Minnesota Rate Cases (Simpson v. Shepard) 230 U.S. 352, 433, 57 L. ed. 1511, 1555, 33 S. Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Gas. 1916A, 18; Los Angeles Gas & E. Corp. v. Railroad Commission, 289 US. 287, 304, 77 L. Ed. 1180, 1191, 53 S. Ct. 637. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U.S. 88, 91, 57 L. ed. 431, 433, 33 S. Ct. 185; Virginian R. Co. v. United States, 272 U.S. 658, 663, 71 L. ed. 463, 467, 47 S. Ct. 222; Tagg Bros. & Moorehead v. United States, supra (280 U.S. 444, 74 L. ed. 537, 50 S. Ct. 537); Florida v. United States, 292 U.S. 1, 12, 78 L. ed. 1077, 1086, 54 S. Ct. 603. In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority." 80 L. ed. 1042.

That this is the modern trend, and the sound trend, is shown by an analysis by James Hart, Professor of Political Science, University of Virginia, published in the March number of the George Washington Law Review. He says:

> "With the gradual development of a responsible bureaucracy manned by civil servants who by training or at least by length of experience are better equipped than the courts to pass judgment upon the technical aspects of modern regulatory problems, judicial review of administrative action should not concern itself with questions within the fields of administrative competence, but should confine itself to those questions which judges are better qualified than administrators to answer; viz., the questions that relate to the more general and permanent criteria of official and human conduct. Accordingly, the courts, when reviewing administrative action, should never ask whether the administrator acted 'correctly'; for when one man asks that about the action of another man, he is in effect asking himself whether he would have acted the same way if he had personally been in the other man's place. When this is the question asked, the judge substitutes his own judgment for that of the administrator, or *ex hypothesi* the judgment of a layman for that of an expert, and thereby tends to nullify the attainment of a principal purpose of the legislature in substituting administrative for judicial enforcement of regulatory standards. What the courts should rather ask is whether the action of the administrator was clearly unreasonable in terms of the statutory purpose and of those criteria of fair play and right conduct which, as the cumulative result of long ages of common human experience, have

found a permanent place in civilized thought and acceptance."

The rest of the article deals with "Discretion in Licensing Cases," "Rules of Evidence," "Questions of Fact," and "Questions of Law," wherein principles are stated wholly in accord with positions taken in appellants' main brief. In his conclusion Professor Hart says:

> "Without going into an analysis of what effect the late unlamented Logan-Walter bill would have, it may safely be said that the philosophy behind the bill looks in a backward direction."

We believe the foregoing statements of principle represent the best thought on the subject, and we believe that our legislature moved in the same direction when it refixed the relations between courts and commissions in the Revised Statutes of Utah, 1933.

We also feel that this Court has brought itself in almost complete harmony with these principles in its recent decisions.

III.

RESPONDENT STATES NO ACTIONABLE GRIEVANCE

Guided, then, by the foregoing principles and the decisions of this Court that the issues triable by the Court in a case like this are the issues raised by the complaint filed in the district court, we may examine the issues so raised. We deem it unnecessary, in view of our main brief, to discuss the first three issues mentioned at the beginning of the brief, but the fourth issue there stated may be examined a little further in view of the respondent's brief.

Did respondent, in its complaint, state grievances sufficient to raise any issues triable by the Court? The grievances stated in the complaint as summarized by respondent's own Counsel as follows:

A. The Commission acted without jurisdiction, because:
   1. The Securities Act and particularly Sec. 82-1-21, sub. 4, is unconstitutional. Brief, p. 7.
   2. The transaction which was made the basis of the Commission's cancellation order was exempted from its control by Section 82-1-5 and 15. Brief, p. 26.

B. Due process was denied respondent at the hearing before the commission, because:
   1. The suspension order failed to state the facts of the accusation. (Complaint, Par. 4, Abs. 2.)
   2. The suspension order failed to state facts sustaining the accusation. (Complaint Par. 5 and 6, Abs. 3 and 4.)
   3. The suspension order was issued contrary to law. (Complaint, Par. 6, Abs. 4.)
   4. The bill of particulars failed to set forth facts sufficient to constitute a cause of action. (Complaint, Par. 7, 8, 11, Abs. 4, 5, 6.)
   5. The plaintiff was not informed as to defendant's informant and was not confronted with the complaining witness. (Complaint, Par. 9, Abs. 5.)
   6. The commission in arriving at its findings and conclusions acted irregularly in having the

transcript of only one side before it. (Complaint, Par. 13, Abs. 8.)

At page 42 of respondent's brief the due process issue is narrowed down to this:

"If the procedure is . . . an independent action, the important allegation of the complaint against the Commission by the person aggrieved is that there are no grounds for revocation", and since paragraph 21 of the complaint alleges respondent has done no wrong a cause of action is stated.

We think it no exaggeration to say that if the last quoted statement were the law, all any aggrieved party would need to do to set the district court in motion for a complete re-hash of every phase of the Commission's procedure, whether issuable or not, is to file a complaint with the court which says, Baby Snooks fashion, "I ain't done nothing."

But in fairness to respondent we admit that it alleged more than "I have done no wrong" and we think that its other allegations are more important. We think that issue "A" above is important if it is true. It raises a constitutional question, but we think it is not well taken.

Issue "B" also raises a fair and important question, but that likewise is not well taken as already shown in our main brief.

The Commission made an order supported by findings of fraud and unworthiness, but nowhere in respond-

ent's brief is any charge made that the findings do not support the order, nor that there was no evidence to support the findings, nor that the evidence did not preponderate in favor of the findings and order. This is natural, because there were no such charges in the complaint.

The six specific charges quoted under issue "B" above constitute the whole of the abuse of due process alleged. "All of which taken together", respondent says at page 40 of its brief, "constitute such a lack of fundamental procedure of justice in a judicial or quasi judicial proceeding that it should be severely condemned".

Quite the contrary is true. Examine the six charges, one by one, or altogether, and they disclose no abuse of discretion or due process at all.

The first charge says: "The suspension order failed to state the facts of the accusation". The fact is the suspension order says:

> "That the said Lauren W. Gibbs, Inc., formerly Lauren W. Gibbs Company, Real Estate, Insurance, Securities, through one or more of its officers or directors have been guilty of a fraudulent act in connection with the sale of certain securities and has demonstrated its unworthiness to transact the business of a dealer in securities within the State of Utah." Abs. 3-4.

If that is insufficient for a Commission whose procedure is much less formal than procedure required by a court of law, what can be said of the suspension order secured by respondent from the district court suspending the Commission's cancellation order. It reads:

> "*Good cause appearing therefor and on motion of Counsel for plaintiff* IT IS ORDERED that . . . the order of the defendants cancelling plaintiff's registration as a dealer in securities . . . shall be suspended and the right of plaintiff to do business in the State of Utah *as a licensed dealer* in securities shall continue." (Abs. 23.) (Italics supplied.)

What was the good cause which moved the Court? It could have been no other than the insufficient complaint, which at the time was not admitted by demurrer or otherwise, and the unsupported statements of Counsel. If that was a sufficient statement of cause for suspension, surely respondent ought not to complain about the carefully stated cause of suspension made by the Commission.

Charge 2 is the same in effect as charge 1.

Charge 3 says: "The suspension order was contrary to law". That is a mere conclusion of the pleader, the insufficiency of which is too apparent to require discussion.

Charge 4 says: "The bill of particulars failed to set forth facts sufficient to constitute a cause of action". The bill was prepared for and delivered to respondent at its request, but notwithstanding its possession of the bill it does not plead the terms of the bill either *haec verba* or in substance. Respondent treats the bill as part of the complaint before the Commission by alleging that it did not state a cause of action, and yet it failed to state to the district court what it contained, apparently think-

ing that its own naked assertion that it was insufficient was enough.

In the case of Doble Steam Motors Corporation v. Daugherty, 232 Pac. 140, cited in our main brief, the aggrieved party urged in his petition that the records of the Securities Commission would disclose certain facts favorable to his application, but he failed to state what said facts were. The Commission, by its demurrer, attacked this allegation as insufficient, and in passing upon the question the Court said:

> "It was at least incumbent upon the applicant to set forth in his application what the records of the Commissioner's own office would disclose in that regard, or, at the very least, to negative in his said application that the Commissioner's records contained any matter contradicting or casting doubt upon its assertion . . . In the absence of any such showing either in said application or in the petition before us, it would be impossible for this court to determine with respect to this particular statement in the petitioner's application whether the Commissioner, upon recourse to his official record, would discover certain facts so that the court could determine whether the Commissioner did or did not abuse his discretion in refusing his sanction to the applicant's proposal."

This rule is applicable to the case at bar with respect to the respondent's allegation that the Bill of Particulars was insufficient.

Charge 5 says: "The plaintiff was not informed as to defendants' informant and was not confronted with the complaining witness." The record made before the

district court shows that the Commission itself was the complainant, and there is no law requiring the Commission to confront the licensee with any particular witness or disclose the name of any particular informant. All the Commission was required to do was to make its case by competent evidence. Authorities on this point will be found in our main brief.

Charge 6 says: "The Commission in arriving at its findings and conclusions acted irregularly in having the transcript of only one side before it". We are unable to see why the point is seriously urged. The Commission is required to make no transcript of the testimony at all, and even if it were litigants are not permitted to sit in with the judges to watch and criticize the methods by which they arrive at their decisions. We apprehend that this Court would not appreciate the litigants' trying to peep in on their conferences and procedure when they retire to decide this case. Why, then, should rumors about the processes by which the Commission arrived at its decision be made the basis of complaint to the district court. Such is not the law, as is amply shown in the main brief.

There are other points raised in the complaint and commented on in respondent's brief, but the foregoing are singled out by respondent itself as the gravamen of its case and, therefore, we confine ourselves to what respondent regards as important. We respectfully submit that it now appears very clear that the Utah Act is not unconstitutional, as complained, and that due process

was accorded respondent at the hearing before the Commission, by reason of which the decision of the lower court should be reversed and the complaint of the plaintiff be dismissed.

Respectfully submitted,

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